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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5284

DOUGLAS RAYMOND DORSEYNSKI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR AMICI CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR AMICI CURIAE

1. In its brief to this Court, respondent persists in raising issues which are not properly presented for review. As to the issues which are presented, respondent makes two significant concessions, which should lead this Court, at a minimum, to vacate the sentence and remand this case for further consideration.

Respondent states:

> "If the Court were to conclude that the Act imposes a mandatory preference for sentencing under Section 5010(b) or (c) for all youth offenders who might derive some benefit from YCA treatment, then it may be appropriate to remand for resentencing in the instant case, because it seems clear that the district court did not consider itself bound by any such standard in sentencing petitioner (A. 45). *In that event the Court need not reach in this case the issues concerning explicit findings, statements of reasons and appellate review.*" (Brief for Respondent at 41) (emphasis supplied)

Respondent further states:

> "While we thus do not believe that the Act itself requires an explicit finding under 5010(d), we recognize that there are reasons favoring some type of procedural requirement to indicate that the potential application of the YCA has been considered. *We believe that such a clear, specific, and limited requirement for an express finding may properly be imposed under the power of this Court* and the courts of appeals to supervise and facilitate the administration of justice in the federal courts, *and we do not oppose such a result.*" (Id., at 48) (emphasis supplied)

Since the court below did not make an express finding and respondent does not oppose such a requirement, there is no remaining issue between the parties on this point, and the case should be remanded.

2. Because respondent has argued so many extraneous points, *amici* feel it necessary to reemphasize that this case does not raise the *substantive* question of what reasons are sufficient under Section 5010(d) of the F.Y.C.A. for refusal to sentence a youth offender to a youth corrections facility. There is no occasion here to define the "no-benefit" requirement, *i.e.*, to give definitive content to § 5010(d)'s language that before a judge may sentence a youth offender as an adult he must conclude that the offender "will not derive benefit from treatment under" the Act.

3. The sole issue in this case is what § 5010(d) *procedurally* requires when it says that, before a judge may sentence a youth offender as an adult, he "shall find" that the youth offender will not benefit from commitment to an F.Y.C.A. facility. Respondent's contention that the "Act does not purport to deal in any way with sentencing

procedures" (Brief for Respondent, at 13) cannot be reconciled with the statute's unambiguous mandate that the judge "shall find" "no benefit" before sentencing under § 5010(d). Respondent finds it impossible to explain away the *en banc* decisions of two circuits that the statute means exactly what it says and that an explicit finding must be made. It can only dismiss these holdings as an "overly-literal" reading of the statuté.

4. Respondent would have this Court read the "shall find" requirement out of § 5010(d). (*Id.* at 32-35) Respondent contends that, since the judge "may" sentence a youth offender under §§ 5010(a), (b), or (c), without any finding, he should be able to do the same under § 5010(d) simply because that provision also uses the word "may." (Id. at 34-35) This contention fails to take account of § 5010(d)'s unambiguous prerequisite that he "may" sentence under other provisions "if" he *"shall"* (as opposed to "may") make a finding of "no benefit." The contrast demonstrates Congress' intent that before a judge is empowered to act under § 5010(d), he must make an explicit rejection of the Act.

5. In its discussion of the legislative history of the F.Y.C.A., respondent continues to downgrade the findings and goals which animated the legislation and led Congress to make a striking break with past correctional practices for youth offenders. Instead, respondent simply quotes fragments from the legislative hearings to the effect that the F.Y.C.A. does not impair the power of the trial judge to sentence a youth offender under applicable adult provisions. (*Id.* at 15-26) As we have shown, however, (Brief of *Amici Curiae,* at 15) these statements only support the position that *amici,* petitioner, and re-

spondent all concur in, viz., the F.Y.C.A. does not *require* the sentencing judge to commit a youth offender to F.Y.C.A. facilities. These statements do not establish respondent's position that there need be no finding (or, alternatively, that the finding may, as a matter of statutory construction, be implicit and unsupported by reasons).

Respondent argues, however, that these statements gain force and meaning in the light of adult sentencing practices of the time, which did not, according to respondent, require explicit findings and statements of reasons before sentencing. Regardless of how one characterizes adult sentencing practices of the time, *amici* submit that the statements quoted by respondent should be read in light of the evolution of youth corrections legislation in the 1940's—legislation which was clearly intended to create new sentencing and correctional practices for youth offenders.

Both the American Law Institute's Youth Corrections Authority Act and the Judicial Conference's 1943 draft legislation—which were the precursors of the F.Y.C.A.—removed significant sentencing power *from the trial judge* and placed it in the hands of *an executive agency*. It was this displacement of sentencing power that troubled a few sitting District Judges. Accordingly, the provision of the 1943 draft legislation conferring sentencing power on a separate Youth Authority was dropped between the 1943 and 1949 versions.[1] By contrast, the "shall find"

[1] As noted in *Amici's* Brief to this Court, both the American Law Institute and the Judicial Conference drafted youth corrections legislation in the 1940's which formed the backdrop for the final version of the F.Y.C.A. *Amicus Curiae* Brief at 6-13. The sentencing provision of the American Law Institute model act *removed substantial power from sentencing judges* since for many

clause of § 5010(d) was, in *haec verba,* contained in the 1943 draft legislation; it did not draw any adverse comment from the judges who were polled about the proposed bill, and it remained in the statute unchanged.[2]

Thus, statements in the 1949 hearings that the bill did not reduce "the authority or interfere with the sentencing power of the judges" (Brief of Respondent, at 16), constituted reassurance that no sentencing power would be

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offenses it *required* the judge to send a youth offender to facilities administered by the Youth Correction Authority. American Law Institute, Youth Correction Authority Act §13 (1940). Two years later, the Judicial Conference draft act had modified the ALI position somewhat. In the draft submitted to the Congress, H. R. 2140, 78th Cong. 1st Sess. (1943), the sentencing judge retained the power to sentence a youth offender as an adult if "the court shall find that the youth offender will not derive benefit from treatment." Title III, §1(c). But under the 1943 Act *the judge's sentencing power was shared with correctional authorities* since the authorities could second-guess the judge and recommend that a youth originally sentenced as an adult be sentenced instead to youth act facilities. This recommendation took effect unless the judge took affirmative action in response to the correctional authorities' re-evaluation of the particular youth offender. Title II, §3.

[2] Respondent contends that the 1943 bill's requirement that reasons be given by a judge if he were going to override the correctional authorities sentence for an adult offender who was to serve over one year, H.R. 2140, *supra,* Title II, §1, demonstrates that the draftsmen of the Act did "where such was their intent, require explicitly some of the procedural measures that petitioner and *amici* contend are implicitly required by the Act." (Brief of Respondent, at 26, n. 18) This contention is illogical. It simply does not follow that there is an inconsistency between the "shall state his reasons" language of Title II, which related to adult sentencing and was dropped, and the "shall find" language of Title III, §1(c), which was retained. The former language arises in a context where a judge is to state his reasons for disagreeing with a conclusion about adult sentencing reached by the correctional authorities. The latter ("shall find") language applies to a judge's initial decision to sentence a youth offender either as an adult or to special youth facilities and the word "finding" is simply an inclusive word meant to cover both the conclusion (of "no-benefit") and the reasons for that conclusion.

withdrawn from the courts and given to the executive branch. These statements did not relate to the manner in which the sentencing power was to be exercised.[3]

6. The fact is that the legislative history is silent on the precise and narrow question before this Court: must the "no-benefit" finding required by § 5010(d) be explicit and supported by reasons? We have shown that such a finding is required by the language of the statute, and further, that the requirement of a finding supported by reasons is the necessary outgrowth of the structure and purposes of the F.Y.C.A. Respondent does not challenge *amici's* analysis of the framework and goals of the Act. Instead respondent constantly emphasizes that the procedural requirements at issue in this case are not found in adult sentencing practice. (Brief of Respondent, at 49-57) But it need hardly be emphasized that this case is not about sentencing practices under the adult criminal code but about sentencing practices under special legislation involving different goals, legislative findings and correction facilities and treatment capabilities for youth offenders. Accordingly, respondent's references to adult sentencing practices are inapposite.

We therefore respectfully urge this Court to hold that, before a judge may sentence a youth offender as an adult, he must state explicitly, with supporting reasons, that the

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[3] See Brief of Respondent, at 14:

> During a discussion of objections by federal judges to an earlier bill, Senator Kilgore, the sponsor of the YCA, similarly noted that two judges "objected to taking sentencing away from the court and giving it to an executive agency. But that has been answered in S. 2609 because it takes nothing away," to which another member of the Judicial Conference committee, Judge Orie L. Phillips, responded: "That is correct; it is purely optional." *Id.* at 69.

youth will not derive benefit from commitment to an F.Y.C.A. institution, to reverse the judgment of the court below, and to remand for reconsideration of sentence under the F.Y.C.A.

Respectfully submitted,

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